NO. 44572-7-II
Cowlitz Co. Cause NO. 12-1-00992-6

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN DUNN,

Appellant.

BRIEF OF RESPONDENT

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I. PROCEDURAL HISTORY

The appellant was charged by information with possession of heroin with intent to deliver with school zone and firearm enhancements, possession of methamphetamine with intent to deliver with school zone and firearm enhancements, possession of diazepam, possession of alprazolam, possession of marijuana less than forty grams, unlawful possession of a firearm in the first degree, and driving with a suspended license. CP 1-4.

The appellant proceeded to jury trial on January 8th, 2013, before the Honorable Judge Michael Evans. After hearing the evidence and arguments of the parties, the jury returned guilty verdicts on all counts, save the driving charge which had been dismissed pretrial, as well as special verdicts for all charged sentencing enhancements. CP 54-63. The appellant was then sentenced to a total of 308 months in prison, of which 192 months were due to the school zone and firearm enhancements. CP 64-79. The instant appeal timely followed.

II. STATEMENT OF FACTS

The State generally agrees with the facts as set forth by the appellant, where appropriate additional facts are cited herein.

III. ISSUES PRESENTED

1. Was there sufficient evidence the appellant was "armed" with a firearm during the commission of the offenses?

2. Did the trial court violate the appellant's right to a public trial by conducting peremptory challenges in writing at sidebar?

IV. SHORT ANSWERS

1. Yes.

2. No.

V. ARGUMENT

I. There Was Sufficient Evidence the Appellant Was "Armed" With a Firearm.

The appellant argues there was insufficient evidence he was armed with the pistol because it was not "easily accessible and readily available" for use. The appellant cites to State v. Gurske, 155 Wn.2d. 134, 118 P.3d 333 (2005) in support of this argument. However, the appellant misapprehends the evidence produced at trial, and Gurske is not analogous to this case.

For the purposes of a sentencing enhancement, a person is "armed" with a firearm if the weapon "is easily accessible and readily available for use, either for offensive or defensive purposes." State v. Schelin, 147 Wn.2d 562, 567, 55 P.3d 632 (2002); State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). In addition, there must be "nexus" between the

defendant, the crime, and the weapon. Schelin, 147 Wn.2d at 568. The term "armed" is not limited to defendants who actually use a weapon during the commission of the crime, or to defendants who have the weapon in their hand or on their person. State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005).

Whether a person is "armed" is reviewed under a sufficiency of the evidence standard. Gurske, 155 Wn.2d at 143. The reviewing court looks to whether any rational finder of fact, viewing the evidence in the light most favorable to the State, could have found the defendant was armed. State v. Eckenrode, 159 Wn.2d 488, 494, 150 P.3d 1116 (2007). When the sufficiency of the evidence is challenged all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Moreover, a claim of insufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Thus, this test if highly deferential for the fact finder, and depends greatly on the unique facts of each case.

In Schelin, the Washington Supreme Court found the defendant was "armed" where a loaded revolver was hanging on a wall six to ten feet from where the defendant was standing in a basement containing his

marijuana grow operation. 147 Wn.2d at 564. Similarly, in Eckenrode, the police found a marijuana grow operation in the defendant's home, along with a loaded rifle and an unloaded handgun. The Supreme Court found there was sufficient evidence he was armed with these weapons while manufacturing marijuana, as it was reasonable to conclude the weapons were there to protect his criminal enterprise. 159 Wn.2d at 493-496. The court noted the defendant failed to meet his burden of showing the evidence was insufficient, and thus his argument failed. Id. at 496.

However, in Gurske, the defendant had proceeded to a stipulated facts trial, on a charge of simple passion of a controlled substance with a firearm enhancement. 155 Wn.2d at 136. The stipulated facts were that firearm was contained in backpack inside the cab of a truck, but that the defendant would have had to exit the truck of move to the passenger seat to access the backpack. There was no indication the defendant could have accessed the pack and remove the pistol from his location in the truck, or that he made any movements toward the pack. Id. at 143. The court held, on these limited stipulated facts, there was insufficient evidence the defendant was armed with the firearm. Id. At 144.

Here, the evidence at trial was that the appellant was arrested while driving a Toyota pickup truck. The appellant was the sole occupant of the vehicle. 3RP 33. When the police attempted to stop the appellant's

vehicle, he continued to drive for some period of time before parking behind a house. While the appellant was driving, he ignored several commands to stop from the police, and was reaching around within the cab of the truck. 3RP 36-37, 3RP 70. After he stopped the vehicle, the appellant was confronted by the police, who ordered him to exit the vehicle at gun point. Despite these commands, the appellant continued to move his hands around the cab of the truck. 3RP 39. When the appellant finally exited the vehicle, he was placed under arrest and searched. During this search, the police found $3,940 in the pocket of the appellant's shorts. 3RP 41.

After a narcotics canine alerted on the appellant's truck, the police obtained a search warrant for the interior of the vehicle. When the warrant was executed, a backpack was found behind the passenger seat of the truck. 3RP 73. Officer Zachary Ripp, the arresting officer, testified the appellant could have reached the backpack from the driver's seat and accessed items inside the pack. 3RP 49. Inside the pack, the police located substantial quantities of heroin and methamphetamine. 3RP 52-55. In a pouch on the front of the pack, the police found a loaded .380 caliber pistol. 3RP 58. A narcotics officer from the Longview Police Department later testified the amount of drugs seized was not consistent with personal

use, and that drug dealers often used firearms to protect their criminal enterprises. 3RP 119-129.

These facts are clearly distinguishable from Guerske, and are sufficient evidence from which a rational jury could find the appellant was armed with the pistol. The appellant was inside the cab of small pickup, and was mere feet away from the backpack containing his narcotics and the pistol.[1] Unlike Guerske, the evidence clearly showed the appellant could access the pistol from his location in the driver's seat. The appellant did not need to exit the vehicle to access the firearm. Also unlike Guerske, the police observing the appellant grabbing for items within the cab of the truck immediately prior to this arrest. Given the testimony, the appellant could have immediately possessed the pistol simply by leaning over and grabbing the gun from the front of the pack. This situation is much more analogous to State v. Sabala, 44 Wn.App. 444, 723 P.2d 5 (1986), where the defendant had ready access to a handgun under the driver's seat of his car.

Moreover, as in Eckenrode, there was ample evidence from which the jury could conclude the appellant was armed with the pistol to protect his criminal enterprise of dealing narcotics. The appellant was in

[1] Exhibit 1, 2, and 3 have been transmitted for this Court's review. These photographs depict the interior of the truck where the backpack was located.

possession of a large amount of cash, almost $4,000, and the jury found that he possessed the heroin and methamphetamine with intent to deliver. The pistol was found in the same bag as the narcotics. Plainly, there was a nexus between the pistol and the underlying crime.

Given the evidence, there is more than sufficient evidence to support the jury's special verdicts that the appellant was armed with a firearm. The appellant has failed to meet his burden of showing otherwise, and his argument should be rejected by this Court. See Eckenrode, 159 Wn.2d at 496.

Finally, the appellant argues the firearm enhancement must be vacated because the pistol was not proven to be operable, citing to State v. Pierce, 155 Wn.App. 701, 714, 230 P.3d 237 (2010). In Pierce, this Court reversed the defendant's firearm enhancement where the jury was not instructed on definition of "firearm" in RCW 9.41.010(7) and the jury actually returned special verdicts for deadly weapon enhancements instead of firearm enhancements. 155 Wn.App. at 714. Since the jury in the instant case was instructed that it must find the weapon at issue was a firearm under RCW 9.41.010(7), Pierce is immediately distinguishable. 4RP 195. Furthermore, as the enhancements in Pierce were already reversed on other grounds, the court's further holding that there was insufficient evidence for the firearm enhancements is non-binding dicta.

Indeed, there is no requirement that operability of the firearm actually be proven. State v. Raleigh, 157 Wn.App. 728, 238 P.3d 1211 (2010). Instead, the question is whether the item at issue is an actual firearm, as defined in RCW 9.41.010(7), or a toy gun or other non-firearm. This has been the law in Washington since State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980), and State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983).

This Court recognized the same in State v. Faust, 93 Wn.App. 373, 967 P.2d 1284 (1998), holding that a firearm enhancement was properly imposed where the firearm at issue was incapable of firing due to a mechanical defect. As the item at issue was an actual firearm, a gun in fact, the firearm enhancement was properly imposed. Faust, 93 Wn.App. at 380. See also State v. Berrier, 110 Wn.App. 639, 41 P.3d 1198 (2002) (this Court held that an inoperable firearm is still a firearm if it is a gun in fact); State v. Mathe, 35 Wn.App. 572, 668 P.2d 599 (1983) (evidence sufficient where firearm was not discharged or recovered, but witnesses testified it was an actual gun.) As there was ample evidence that the gun was an actual firearm, and it was loaded with live cartridges, the appellant's argument should be rejected by this Court.

II. The Trial Court Did Not Violate the Appellant's Right to a Public Trial.

The appellant argues that the trial court closed the courtroom to the public by conducting peremptory challenges at sidebar using a written form. The appellant alleges this practice violated Article 1, section 22 of the Washington Constitution as well as the Sixth Amendment of the United States Constitution.[2] However, the practice complained of did not amount to a closure of the courtroom, under the standard announced in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), and the appellant failed to preserve any alleged error for appeal. As such, this Court should reject any claim of error.

a. Exercising Peremptory Challenges at Sidebar Using a Written Form Does Not Constitute a "Closure" of the Courtroom.

Where a public trial violation is asserted, the reviewing court must first consider whether (1) the proceeding at issue implicates the public trial right and (2) did a closure actually occur. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). The Washington Supreme Court has observed that "not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." Sublett, 176 Wn.2d at 71.

[2] The appellant does not argue the applicability of the decree of Article 1 § 10 of the Washington Constitution that "Justice in all cases shall be administered openly."

In Sublett, the court announced a new test under Washington law for whether a particular proceeding implicates the public trial right, rejecting the prior test employed by the Court of Appeals. Id. at 71-72; citing to Press-Enterprise Co. v. Superior Court, 478 US. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). The new test uses experience and logic to determine if the public trial right attaches to a specific proceeding. The experience prong asks "whether the place and process have historically been open to the press and general public" while the logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Sublett, 176 Wn.2d at 73. The answer to both questions must be "yes" for the public trial right to attach. Id. The party asserting the violation of public trial right bears the burden of proof on this issue. Id. at 75.

Using this test, the Sublett court found that the public trial right does not attach to counsel meeting with the trial judge in chambers to answer a question from a deliberating jury. Id. Notably, such proceedings have not historically been conducted in an open courtroom. Id. at 75. Also, the court's answer to the jury was recorded in writing, thus becoming part of the public record and reminding the court and counsel of their duties. Id. at 77. Given this, the experience and logic test was not satisfied and the defendant failed to establish a public trial violation.

Here, the appellant argues his public trial right was violated because peremptory challenges were exercised by writing on a form at sidebar rather than orally announcing the challenges. Brief of appellant at 18-21. However, the appellant fails prove that both prongs of the "experience and logic" test support the public trial right attaching to the exercise of peremptory challenges. This burden is the *appellant's* to meet with actual evidence and proof, rather than argument and conjecture. See Sublett, at 176 Wn.2d at 75-76.

Preliminarily, the State disputes that any closure whatsoever occurred. A closure occurs "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). The exercise of peremptory challenges occurred in an open courtroom and in the presence of the appellant and whatever members of the public, if any, desired to be there. The fact that the challenges were exercised at sidebar using a written document does not amount to the type of courtroom closure contemplated by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), as there was no actual sealing of the courtroom, exclusion of persons, or an affirmative action by the trial court to actually bar the public from attending.

Assuming, for the sake of argument, a closure actually did occur, the Court must examine the process at issue. The nature of exercise of peremptory challenges are governed by CrR 6.4(e):

> (1) Peremptory Challenges Defined. A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror. In prosecutions for capital offenses the defense and the state may challenge peremptorily 12 jurors each; in prosecution for offenses punishable by imprisonment in the state Department of Corrections 6 jurors each; in all other prosecutions, 3 jurors each. When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the number of challenges provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant.
>
> (2) Peremptory Challenges--How Taken. After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors subsequently called.

Notably, CrR 6.4 does not prescribe the exact process and form by which peremptory challenges are to be exercised, i.e. orally, in writing, at sidebar, etc. The appellant offers absolutely no caselaw or proof that the use of a written form to exercise peremptory challenges violates the longstanding history and experience of the courts of Washington. In fact, the only authority offered by the appellant on the prevalence of one method over another, State v. Thomas, 16 Wn.App. 1, 553 P.2d 1357 (1976), actually indicates that the use of written peremptory challenges

was common place. Indeed, Thomas explicitly rejected a public trial violation claim for this practice. 16 Wn.App. at 13. Thus, the appellant has not even attempted to meet his burden of showing that the exercise of peremptory challenges has historically been conducted orally or open to the press and public. The appellant *must* make this showing to satisfy the "experience" prong of the Sublett test. Again, the appellant must meet his burden on both prongs for his claim to succeed.

Turning to the "logic" prong of the Sublett test, the appellant again fails to offer any evidence or authority to support an argument that logic dictates the exercise of peremptory challenges be conducted orally, rather than in writing or sidebar. For this prong, the question is whether "public access plays a significant positive role in the functioning of the particular process in question." Sublett, 176 Wn.2d at 73. The sole point advanced by the appellant is that the oral exercise of peremptory challenges would allow the public to discern whether the parties were challenging protected classes of jurors improperly. Brief of Appellant at 20-22.

This argument is inherently fanciful, as the public cannot challenge the exercise of peremptory challenges in the midst of trial, or at any point thereafter. Contrary to the appellant's brief, the public does not have any "oversight" authority over a trial. Brief of Appellant at 21. The public may not raise objections to the conduct of the trial. The *defendant* may do so,

and the appellant's failure to raise such an objection in this case is proof that no such misconduct occurred.

Moreover, the actual struck list used in this case includes the names of the jurors, so that the public would be able to identify the prospective jurors after the fact if there was a desire to investigate their race, gender, or other demographic information. Supp. CP ___ (sub no. 25, Struck Juror List, filed 1/8/2013). Though the appellant's argument may identify a hypothetical benefit to the oral exercise of peremptory challenges, this is a far cry from proving it would have a "*significant* positive role in the functioning of the particular process" as required by Sublett. Indeed, the struck list, with its written record of the parties' challenges, is a part of the public record of the trial. As with the jury question in Sublett, the written form satisfies the need for openness, and the appellant has failed to show otherwise.

This conclusion is further supported by the decision in State v. Love, 176 Wn.App. 911, 309 P.3d 1209 (2013). In Love, the defendant advanced the exact issue before the Court in this case, the use of a written form to exercise peremptory challenges. After a thorough and searching review of the caselaw and historical practices, the Love court found the defendant had failed to show that under the "experience and logic" test the public trial right attached to the exercise of peremptory challenges. 176

Wn.App. at 920. Though the appellant takes issue with the Love decision, he fails to point to any caselaw or history ignored by the court. This inability to meaningfully distinguish Love undermines the appellant's argument, and this Court should reject it and follow the Love decision.

b. If There Was a Closure, Any Error Was Not Preserved for Appeal.

If the Court should find there was a closure of the courtroom on matters that implicate the right to a public trial, the appellant is still not entitled to a new trial as he failed to object and thereby preserve the error for review by this court. The Court should thus decline to consider this issue for the first time on appeal.

In State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957) the trial court locked the courtroom door to prevent spectators' distracting the jury during closing arguments by filing in and out of the courtroom. 50 Wn.2d at 746. The defendant did not object at trial but on appeal he claimed a violation of his right to a public trial. Id.

The court refused to consider this argument for the first time on appeal. In doing so, the court distinguished between rulings that clearly violate the right to an open trial versus those rulings that involve the exercise of discretion. Id. at 747-748. The court held that a discretionary

ruling on courtroom closure must be objected to, whereas an order that clearly violates the right to a public trial can be reviewed absent an objection. The Collins decision is still binding precedent in Washington, as it has not been overruled by any subsequent public trial case. The holding is reproduced below in its entirety:

> If an order of a trial court clearly deprives a defendant of his right to a public trial, as in People v. Jelke, 1954, 308 N.Y. 56, 123 N.E.2d 769, 48 A.L.R.2d 1425 [where both the public and the press were excluded from the whole trial], it is unnecessary for the defendant to raise the question by objection at the time of trial. State v. Marsh, 1923, 126 Wn. 142, 145-146, 217 P. 705.
>
> However, if, as in the present case, a reasonable number of people are in attendance and there has been no partiality or favoritism in their admission, an order excluding the admittance of others may be entered if justification exists. The issue then becomes whether the trial court abused its discretion in so ordering, i. e., whether the order complained of was necessary to prevent interference with the orderly procedure of the trial. *Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter.* Keddington v. State, 1918, 19 Ariz. 457, 462, 172 P. 273, L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided.)
>
> There is here no claim of actual prejudice; there was no objection to the discretionary ruling. We are satisfied that the defendant did have a public trial within the purview of our constitutional provisions.

Id. at 747-48 (italics added).

Collins has never been abrogated. Nor has it been established that Collins should be overruled because it is incorrect and harmful. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Here, where it is not at all clear that the courtroom was actually closed, it cannot be said that that the process used "clearly deprive[d] a defendant of his right to a public trial" such that no objection would be necessary. For these reasons, this Court should hold that the appellant, like the defendant in Collins, failed to preserve a claim of error as to the trial court's discretionary ruling.

Furthermore, allowing the appellant to advance this claim on appeal, after having failed to object at trial, is plainly contrary to RAP 2.5(a)(3). There no showing, or even claim, of prejudice to the appellant in this case. To allow the appellant to participate in a process at trial and then seize upon the practice to win a new trial is illogical, inefficient, and unjust. See United States v. Bansal, 663 F.3d 634, 661 (3rd Cir. 2011) (allowing defendant to raise public trial violation for the first time on appeal described as "classic sandbagging of the trial judge.") Based on these precedents and the record of this case, the Court should find that the appellant failed to preserve whatever error may have occurred at trial.

VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the instant appeal and uphold the appellant's convictions and sentence.

Respectfully submitted this 13th day of February, 2014.

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CERTIFICATE OF SERVICE

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on February 3rd, 2014.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

February 13, 2014 - 1:10 PM

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